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JUAN GIL

UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

UNITED STATES OF AMERICA

Plaintiff,

v.

ARMANDO BARAJAS, et al.,  
JUAN GIL (2)  
Defendant.

Case No.: 2:10-CR-00351-ODW-02

**DEFENDANT JUAN GIL'S MOTION  
TO SUPPRESS EVIDENCE DERIVED  
FROM WIRETAPS ISSUED  
WITHOUT PROBABLE CAUSE**

Hearing Date: October 15, 2012  
Hearing Time: 10:00 a.m.  
Hon. Otis Wright II

TO THE UNITED STATES ATTORNEY ANDRE BIROTTE AND ASSISTANT  
UNITED STATES ATTORNEYS REEMA EL-AMAMY AND MICHAEL DORE and  
all interested parties:

PLEASE TAKE NOTICE that defendant Juan Gil, through counsel, hereby files  
his motion to suppress evidence derived from wiretaps issued without probable cause.

Respectfully submitted,

KESTENBAUM EISNER & GORIN LLP

Dated: September 17, 2012

/S/ ALAN EISNER

ALAN EISNER  
Attorney for Defendant  
JUAN GIL

1                   **MOTION TO SUPPRESS EVIDENCE DERIVED FROM WIRETAPS**  
2                                   **ISSUED WITHOUT PROBABLE CAUSE**  
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4           Rather than undertake the basic investigative tasks necessary to demonstrate the  
5 need for a wiretap, the government just started its investigation by applying for a wiretap.  
6 By leap-frogging over rudimentary investigative tasks, for many of the individuals whose  
7 conversations law enforcement sought to eavesdrop upon, the wiretap applications (a) fail  
8 to establish probable cause that the individual was engaged in any criminal activity, (b)  
9 fail to establish probable cause that conversations concerning any criminal activity would  
10 occur over the telephone, or (c) fail to establish probable cause that the individual  
11 regularly used the targeted telephone. Law enforcement must establish *all three* types of  
12 probable cause before a wiretap may issue.

13  
14                                   **STATEMENT OF FACTS**

15           In February 2009, the government sought the first in a series of wiretaps. Based  
16 on the affidavit of Ontario Police Officer Kris Lavoie, the wiretap application identified  
17 18 specific living individuals, in addition to one dead person and “others known,  
18 unknown, or unidentified,” whose conversations it wanted to intercept through the  
19 proposed wiretap. Bates 005. The proposed wiretap sought to intercept communications  
20 over two separate telephone lines, one allegedly used by Defendant Marco Antonio  
21 Torres-Cruz, whom the government identified only as “Alex,” and allegedly suspected to  
22 be used by Torres-Cruz’s alleged source for narcotics, a person enigmatically identified  
23 only as “UM” and “SOS”. Bates 002-003.

24           The government claimed a two-fold investigative objective. The principal focus  
25 of the investigation was, ostensibly, “to identify members and associates of the Ontario  
26 Black Angels,” which Officer Lavoie characterized as “criminal street gang,” even  
27 though neither “Alex” nor the reputed “source” were suspected to be associated with the  
28

1 purported “gang.” Bates 036.<sup>1</sup>

2       Secondarily, the government claimed to seek more information about “Alex’s”  
3 narcotics trafficking. Bates 036.

4       Insofar as the Black Angels aspect of the investigation was concerned, the  
5 government sought to target the communications of Manuel Vega, who Lavoie identified  
6 as “a known and admitted member of the Ontario Black Angels” but who, Lavoie  
7 acknowledged “was the victim of a homicide.” Bates 032, 044.<sup>2</sup> The only other person  
8 targeted by the wiretap who was allegedly affiliated with the Black Angels was  
9 Defendant David Navarro. Officer Lavoie hypothesized that “Navarro contacts Alex to  
10 collect extortion payments,” Bates 032, but the only specific fact offered in support of  
11 this hypothesis was the existence of a single, isolated telephone conversation that  
12 occurred three months earlier, in November 2008, when Vega was still alive, that Officer  
13 Lavoie interpreted as indicating that “‘David’ assisted Vega by collecting extortion  
14 payments.” Bates 041. Officer Lavoie hypothesized that “Navarro has taken over the  
15 responsibilities of collecting extortion payments” following Vega’s death, Bates 044, but  
16 the affidavit contained no specific facts suggesting any basis for this assertion other than  
17 rank speculation.

18       The government’s showing as to targets connected with “Alex” was no less  
19 asthenic.

20       Apart from the dead Vega, the government made *no showing whatsoever* of  
21 probable cause as to five of the Target Subjects. For example, Larry Cuevas was  
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23       <sup>1</sup> In October and November of 2008, local authorities established wiretaps on Torres-Cruz,  
24 claiming to focus only on investigating Torres-Cruz and those he dealt with. The last state  
25 wiretap expired January 12, 2009. After a one month gap, federal authorities began overseeing  
26 the case and added the Black Angels as their investigative focus.

27       <sup>2</sup> Lavoie represented that Vega had been murdered in January 2008, a year earlier, Bates 032,  
28 044, even though law enforcement clearly knew that Vega had been killed only a month before  
the wiretap application, Bates 2830-2910, and had been in communication with others in October  
2008 and January 2009, more than 9 months to a year after his reported death. Bates 040, 050,  
159, 172, 308. Vega was, in any event, still dead and unlikely to be communicating on any of  
the target telephones.

described only as “a *previous* customer and courier.” Bates 034. The affiant clarified that Cuevas was “currently in custody.” Bates 034. The affiant stated, in describing Target Subjects Patrick Orosco and Shawn Young, that law enforcement “believed” that each was a street level courier, Bates 034-035, but the affiant stated no further specific underlying facts from which the issuing judge could draw such a conclusion. Indeed, Onsurez and Young were not mentioned in the affidavit other than identifying them as Target Subjects whose phone conversations were to be intercepted by government agents. Ray Perez and “Mario LNU” were identified only as “customers” but, again *no facts* about any purchase or contacts were given from which a judge could infer that a seller-customer relationship existed.

## ARGUMENT

### **I. Law Enforcement Failed to Establish the Requisite Three Types of Probable Cause For Many of The Target Subjects**

The Fourth Amendment regulates “not only the seizure of tangible items, but extends as well to the recording of oral statements.” *United States v. United States Dist. Court*, 407 U.S. 297, 313, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972), quoting *Katz v. United States*, 389 U.S. 347, 353, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). It quite clearly provides that “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause.” U.S. CONST., amend. IV.

In order to constitute a lawful wiretap, 18 U.S.C. § 2518(3) similarly forbids judicial officers from granting wiretap orders without probable cause. Congress, in fact, required the government to demonstrate three different types of probable cause before a court could lawfully intercept otherwise-private telephone communications. Under 18 U.S.C. § 2518(3), a “judge may enter an ex parte order . . . authorizing or approving the interception of wire, oral, or electronic communications [only] . . . if the judge determines on the basis of the facts submitted by the applicant that:

1 “(a) there is probable cause for belief that [the] individual is  
2 committing, has committed, or is about to commit a particular offense  
3 enumerated in section 2516 of this chapter.

4 “(b) there is probable cause for belief that particular communications  
5 concerning that offense will be obtained through such interception . . . [and]

6 “(d) there is probable cause for belief that the facilities [to be  
7 intercepted] . . . are leased to, listed in the name of, or commonly used by  
8 such person.”  
9

10 18 U.S.C. § 2518(3)(a), (b), (d). See also *United States v. Meling*, 47 F.3d 1546, 1552  
11 (9th Cir. 1995).<sup>3</sup>  
12

13 “Probable cause exists when there is a fair probability or substantial chance of  
14 criminal activity.” *United States v. Bishop*, 264 F.3d 919, 924 (9th Cir. 2001), citing  
15 *Illinois v. Gates*, 462 U.S. 213, 235, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). Although  
16 “not readily, or even usefully, reduced to a neat set of legal rules,” the existence of  
17 probable cause “turn[s] on the assessment of probabilities in particular factual contexts.”  
18 *Gates*, 462 U.S. at 238. To satisfy the constitutional minimum:

19 the facts and circumstances within an officer’s knowledge and of which he  
20 had reasonably trustworthy information [must be] sufficient in themselves  
21 to warrant a man of reasonable caution in the belief that an offense has been  
22 or is being committed, and that evidence bearing on that offense will be  
23

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24 <sup>3.</sup> A district judge authorizing a wiretap must enter several statutorily-required findings of  
25 probable cause. The judge must find probable cause to believe (1) that an individual is  
26 committing, has committed, or is about to commit specified offenses, including product  
27 tampering and obstruction of justice, 18 U.S.C. § 2518(3)(a); (2) that communications  
28 relevant to that offense will be intercepted through the wiretap, *id.* § 2518(3)(b); and (3)  
*id.* § 2518(3)(d).  
*Meling*, 47 F.3d at 1551-52.

found in the place to be searched.

*Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 370, 129 S.Ct. 2633, 174 L.Ed.2d 354 (2009), quoting *Brinegar v. United States*, 338 U.S. 160, 175-176, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949), quoting *Carroll v. United States*, 267 U.S. 132, 162, 45 S.Ct. 280, 69 L.Ed. 543 (1925).

Even in *Gates*, however, the Supreme Court reaffirmed that bare conclusions are insufficient. A “conclusory statement that gives the magistrate virtually no basis at all for making a judgment” fails to satisfy the probable cause standard required by the constitution. *Gates*, 462 U.S. at 239. Rather, an affidavit “must provide the magistrate with a substantial basis for determining the existence of probable cause.” *Gates*, 462 U.S. at 239.<sup>4</sup> The Supreme Court emphasized:

Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others. In order to ensure that such an abdication of the magistrate’s duty does not occur, courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued.

*Gates*, 462 U.S. at 239.

## **II. The Affidavit Supporting the February 2009 Wiretap 09-38 Failed to Establish All Three Types of Probable Cause for Each Target**

**1. Manuel Vega:** The wiretap affidavit sought to intercept the conversations of a dead person, Manuel Vega. The defect in this is not that law enforcement did not have the assistance of a medium on their side, but that the agents executing the wiretap

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<sup>4</sup> Thus, for example, “A sworn statement of an affiant that ‘he has cause to suspect and does believe’ . . . [certain facts exist] will not do.” *Gates*, 462 U.S. at 239, citing *Nathanson v. United States*, 290 U.S. 41, 54 S.Ct. 11, 78 L.Ed. 159 (1933). Similarly, “An officer’s statement that ‘[a]ffiants have received reliable information from a credible person and do believe’ that heroin is stored in a home, is likewise inadequate.” *Gates*, 462 U.S. at 239, citing *Aguilar v. Texas*, 378

1 were instructed to eavesdrop upon conversations so they could learn the voices of the  
2 various wiretap targets. Bates 090-091. As a result, throughout the wiretap period but  
3 especially during the early stages of the interception, by adding superfluous targets to  
4 their wiretap, the monitoring agents could justify listening for a longer period of time for  
5 the dead person who never be on the phone. *United States v. Chavez*, 533 F.2d 491, 493-  
6 94 (1976).

7       **2. David Navarro:** Officer Lavoie offered the issuing judge no specific  
8 factual information “to warrant a man of reasonable caution in the belief that an offense  
9 has been or is being committed,” *Safford Unified School Dist.*, 557 U.S. at 370, let alone  
10 that he was likely to use the phone during the interception period to further the  
11 speculative hypothesized crimes, § 2518(b)(3)(b), (d). The only fact about Navarro was  
12 that, three months earlier, when Vega was still alive, Navarro had “assisted Vega” on one  
13 isolated occasion, apparently at Vega’s behest. Bates 041. Vega was now dead. Officer  
14 Lavoie provided no specific facts suggesting that Navarro ever had any other  
15 communication or that he ever did so other than at Vega’s request. Although Officer  
16 Lavoie speculated that Navarro had “taken over the responsibilities” of Vega, other than  
17 this bald conclusion, the affidavit provided no facts to support that “bare conclusion.”  
18 The officer’s conclusion is inadequate. *Gates*, 462 U.S. at 239; 18 U.S.C. § 2518(3)(a).

19       There was a single communication by Navarro. There was no fact stated  
20 indicating that it was a criminal conversation. Even if criminal, there was no fact stated  
21 indicating that Navarro ever had a similar conversation with anyone at any later time.  
22 There was no fact indicating that Navarro was currently engaging in any communications  
23 over the telephone, let alone over either of the target telephones. 18 U.S.C. § 2518(3)(b),  
24 (d).

25       Law enforcement apparently obtained a pen register or trap and trace device on  
26 Alex’s telephone. “The pen register is a device used typically in the early stages of an  
27 investigation to generate leads for further inquiry.” *Hodge v. Mountain States Tel. & Tel.*

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U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964).



1 Co., 555 F.2d 254, 258 (9th Cir. 1977). The pen register did not provide any leads to  
2 implicate that Navarro was communicating on either target telephone.

3 Devoid of evidence that Navarro was involved in any crime, that Navarro used the  
4 telephone to communicate information about those hypothetical crimes, or that Navarro  
5 had communicated over the target telephone at any time during the prior 3 months (let  
6 alone did so on a regular basis), the affidavit failed on all three elements of probable  
7 cause as to David Navarro. 18 U.S.C. § 2518(3)(a), (b), (d).

8 **3. Carmela “LNU”:** Stating that Carmela was Alex’s wife, Officer Lavoie  
9 sought to intercept all of Carmela’s communications with Alex. Bates 035. Officer  
10 Lavoie hypothesized that Carmela “assists” Alex in his drug dealing but suggested no  
11 specific facts to either support or explain that hypothesis. Apart from her marital  
12 relationship with “Alex” and their cohabitation, Officer Lavoie offered no facts  
13 suggesting that Carmela had ever engaged in any illegal activity or ever communicated  
14 with Alex over the target telephone. Was he, for example, asserting that Carmela’s  
15 assistance consisted of cooking dinner for the couple, as a result of which Alex felt  
16 nourished and could carry on his alleged illegal activity? The wiretap judge had no idea.  
17 After describing her as Alex’s wife, Officer Lavoie never again referenced Carmela in the  
18 affidavit, let alone suggested there was any basis for wiretapping the suspect’s wife.

19 Devoid of facts establishing probable cause that Alex’s wife was (a) engaged in  
20 criminal activity, (b) used the phone to communicate with her husband about illegal  
21 activities, and (c) regularly communicated with her husband over the target telephone, 18  
22 U.S.C. § 2518(3)(a), (b), and (d), law enforcement was not legally authorized to expand  
23 the scope of their search to listen for her communications.

24 **4. “Cabezon”:** Cabezon was identified as Alex’s brother-in-law and his  
25 communications were targeted on the hypothesis that, in some unidentified way, he  
26 “assists Alex with his narcotics distribution.” Bates 035. Officer Lavoie said his  
27 conclusion was “based on intercepted calls” over Alex’s phone, Bates 035, but did not  
28 identify who participated in the phone call (such as whether the inference was derived



from statements made by Cabezon or made by others about Cabezon), what was said, when the phone call was placed, or whether the assumption was based on a single, isolated phone call or a series of phone calls. The affidavit stated no other facts detailing what Cabezon's "assistance" supposedly consisted of (which might have been nothing more than providing a place for rest and relaxation on the weekends while Alex visited along with his wife), when it had occurred in the past, or how often it occurred. The affidavit did not suggest that the person referred to as Cabezon had ever used either target telephone nor provided any basis for believing that he would do so in the future. The affidavit made no further reference to Cabezon after stating that law enforcement wanted to listen in on Cabezon's conversations.

Having failed to identify any specific facts, Officer Lavoie's affidavit failed to establish probable cause that Cabezon was involved in any criminal activity. 18 U.S.C. § 2518(3)(a). Officer Lavoie's affidavit similarly failed to establish any basis for inferring that Cabezon would communicate about the hypothesized criminal activity over the phone, § 2518(3)(b), or that Cabezon ever used or had access to Alex's telephone, § 2518(3)(d).

**5. Larry Cuevas:** Larry Cuevas was described only as "a *previous* customer and courier." Bates 034. The affiant clarified that Cuevas was "currently in custody." Bates 034. By affirming his status as only a *previous* customer and courier, law enforcement implicitly acknowledged that any connection between Cuevas and the other Target Subjects was stale. Moreover, by confessing that Cuevas was "currently in custody," Officer Lavoie also simultaneously conceded that Cuevas was unlikely to be able to make a call from or to either of the target telephones.<sup>5</sup> 18 U.S.C. § 2518(3)(a), (b), (d).

**6. Paul Onsurez and Shawn Young:** The affiant stated, in describing Target Subjects Paul Onsurez and Shawn Young, that law enforcement "believed" that each was a street level courier, Bates 034-035, but the affiant stated no further specific underlying

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<sup>5</sup>. Officer Lavoie affirmed that both target telephones were cellular telephones, Bates 002-003, 024-025, 053, while inmate phones cannot place calls to cellular telephones.

1 facts from which the issuing judge could draw such a conclusion. Cf. *Gates*, 462 U.S. at  
 2 239. Indeed, Onsurez and Young were not mentioned in the affidavit other than  
 3 identifying them as Target Subjects whose phone conversations were to be intercepted by  
 4 government agents. There was no showing of probable cause that they were engaged in  
 5 any of the target offenses, “commonly used” the targeted telephones, or were probably  
 6 likely to communicate about the target offenses over the target telephones. 18 U.S.C. §  
 7 2518(3)(a), (b), (d).

8 **7. Ray “LNU”:** The affidavit identified Ray “LNU” only as a “customer,”<sup>6</sup>  
 9 Bates 035, but, again *no facts* about any purchase or contacts were given from which a  
 10 judge could infer that a seller-customer relationship existed. Ray was additionally  
 11 described as “a friend of Shawn Young” but the affidavit offered no facts suggesting that  
 12 the relationship was a basis for inferring any criminal connection on Ray’s part,  
 13 especially after the affidavit provided no facts from which one could infer Young was  
 14 engaged in any criminality. 18 U.S.C. § 2518(3)(a). The affidavit stated no facts  
 15 regarding Ray’s use of any telephones, let alone the target telephones, let alone that he  
 16 would communicate any information over the phone that was related to the investigation.  
 17 18 U.S.C. § 2518(3)(b), (d).

18 **8. Mario “LNU”:** Based on an unidentified telephone conversation between  
 19 “Richard LNU” and Alex, Bates 051 ¶ 45.b, Officer Lavoie inferred that Mario was a  
 20 “customer” of Richard’s, Bates 034. Devoid of any facts such as to what was said, by  
 21 whom, or when, the wiretap judge was in no position to find that the officer’s  
 22 unexplained conclusion amounted to probable cause that Mario was engaging in illegal  
 23 activity. *Gates*, 462 U.S. at 239; 18 U.S.C. § 2518(3)(a). The affidavit provided no  
 24 information from which anyone could infer that Mario had access to any telephone, let  
 25 alone either of the target telephones, or ever spoke to Alex. 18 U.S.C. § 2518(3)(b), (d).

26 **9. Richard “LNU”:** Officer Lavoie identified Richard LNU as “a *former*  
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28 <sup>6</sup> Ray was later identified in the May 2009 wiretap as Ray Perez who was, by that time, “a former customer.” Bates 300 ¶ 21.m.

customer” of Alex’s.” Bates 034. Officer Lavoie stated that Richard worked with someone (Steve Hoyos) who worked with Alex. Bates 034. Officer Lavoie identified only a single instance, January 5, 2009, five weeks before the February 13, 2009 wiretap application, where Richard used a telephone. According to Lavoie, Richard had been the victim of a robbery, and Alex called Richard and asked him what happened. Bates 050-51. Officer Lavoie identified no other instance, during the entire history of the investigation, where Richard supposedly spoke on or had access to Alex’s telephone. The only facts offered by the affiant was that Richard was the victim of a crime, not a criminal himself. *Cf.* 18 U.S.C. § 2518(3)(a). The facts did not demonstrate that Richard “commonly used” the target telephone let alone spoke about the target offenses over the telephone. 18 U.S.C. § 2518(3)(b), (d).

**10. Gabriel Macias:** Similar to Onsurez and Young, Officer Lavoie hypothesized that Macias was a “street level courier” for Alex. Bates 035. With Macias, however, Officer Lavoie added that, in August 2008, seven months before the wiretap application was being filed, Macias had been stopped by police and “suspected of being under the influence of heroin” and, not surprisingly for a user, also found in possession of heroin and cocaine. Bates 082-83. Police discovered some undescribed “handwritten notes” during a search of Macias’s car. Bates 083. The affidavit did not provide any information about the amount of drugs possessed or nature of their packaging suggesting anything more than that Macias was a casual user or a drug addict.<sup>7</sup> The facts did not demonstrate probable cause of a crime for which wiretapping was authorized. 18 U.S.C. § 2518(3)(a).

Macias had, on that one occasion in August 2008, seven months before the wiretap February 2009 application, apparently used his telephone to speak with Hoyos, a person who spoke with Alex. Bates 083. There was no indication Macias had any contact with

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<sup>7</sup> That Macias may have been guilty of driving under the influence was (a) not a crime for which wiretapping is authorized, 18 U.S.C. § 2516, and (b) not a crime for which it is reasonable to assume that wiretapping would be highly effective to capture evidence, 18 U.S.C. § 2518(3)(b).

Alex or the target telephones and, thus, a lack of probable cause that he would be intercepted talking about the target offenses on those phones. 18 U.S.C. § 2518(3)(b), (d).

**11. Sara Misquez:** Sara Misquez was not alleged to have any connection with the Black Angels. Officer Lavoie described Misquez as “a *previous* courier for Alex,” Bates 033, a status not consistent with probable cause for believing that she was participating in the target offenses. 18 U.S.C. § 2518(3)(a).

The only evidence that Misquez had any contact with “Alex” was the one time when she happened to be at the same Carl’s Jr. fast food restaurant at the same time as Alex in July 2008. A month later, in August 2008, when surveillance was tracking Alex (“Torres-Cruz”), he drove by Misquez’s house on one occasion on his way to another location. Bates 066-67. Misquez had been arrested in March 2008, Bates 038, nearly a year before the wiretap application, had subsequently pled guilty, and was still “in custody” at the time of the wiretap application, Bates 039. An informer trying to work off a new criminal case told law enforcement Misquez had *previously* been connected with Alex in June 2008, Bates 036-37, about three months after she was arrested and still nine months before the wiretap application. Officer Lavoie did not suggest that Misquez ever spoke to Alex on Alex’s telephone (TT#1) or over *any* telephone. These facts failed to establish probable cause that she would be communicating with Alex over the target telephone regarding the target offenses. 18 U.S.C. § 2518(3)(b), (d).

**12. Patrick Orosco:** Although presenting facts suggesting that Orosco was in regular telephone contact with Alex, Officer Lavoie provided no facts from which the wiretap judge could reasonably conclude that Orosco was involved in illegal activity or used the phone for illegal activity. Officer Lavoie hypothesized that Orosco was “believed to be a narcotics courier for Alex[]” but provided no facts to support that conclusion. Bates 034.

Here, law enforcement tendered only the fact that Alex may have been in criminal activity and that Orosco spoke to Alex. But “mere guilt by association . . . is insufficient

probable cause to support a search warrant.” *United States v. Brown*, 951 F.2d 999, 1004 (9th Cir. 1991), citing *Ybarra v. Illinois*, 444 U.S. at 91. In similar circumstances, the Supreme Court declared “It must be emphasized that [law enforcement] was completely ignorant regarding the content of these conversations” when affirming an absence of probable cause to search. *Sibron v. New York*, 392 U.S. 40, 62, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968). “The inference that persons who talk to narcotics [dealers] are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security.” *Id.*, at 62.

Devoid of facts establishing probable cause that (a) Orosco was engaged in criminal activity and (b) Orosco was conversing about that criminal activity over the telephone, law enforcement was not permitted to expand the scope of their search to listen for Orosco’s communications. 18 U.S.C. § 2518(3)(a), (b).

**Summary:** Law enforcement failed to establish any one of three required showings of probable cause for each of the only two individuals alleged to provide the Black Angels aspect of the investigation. There was an inadequate showing of one or more of the required probable cause showings as to at least 11 of the 17 individuals law enforcement sought to intercept regarding the investigation of Alex.

### **III. The Affidavit Supporting the March 2009 Wiretap 09-38(A) Failed to Establish All Three Types of Probable Cause for Each Target**

**1. Carmela “LNU”:** As of the March 2009 wiretap, Officer Lavoie could provide no more information about Carmela’s hypothesized illegal activity other than that she was Alex’s wife, she lived with him, and, in some unspecified way, Officer Lavoie “believes [she] assists” her husband. Bates 154. Apart from her marital and cohabitation relationship with Alex, her name was never again mentioned at any point in the affidavit.

Not only did law enforcement fail to establish probable cause to intercept Carmela’s conversations based on the minimal facts provided in the first affidavit, but,

1 after an entire month of wiretapping, law enforcement was able to say no more about  
2 Carmela than they had reported over a month earlier. She, apparently, was not on the  
3 phone and, if she was, was not talking about any criminal activity. Whatever could be  
4 said for the effete probable cause showing in 09-38, law enforcement had utterly failed to  
5 demonstrate a reasonable basis for eavesdropping on Carmela's telephone conversations  
6 in March 2009. There was no probable cause to demonstrate her involvement in any  
7 target offense, her use of the target telephones, or her discussion of any of the target  
8 offenses. 18 U.S.C. § 2518(3)(a), (b), (d).

9       **2. Cabezon:** The March 2009 affidavit added no new information about  
10 Cabezon. Officer Lavoie repeated his assumption from the February 2009 affidavit that  
11 he presumed that based on previously intercepted calls, he "believe[d]" that Cabezon  
12 (Alex's brother-in-law) somehow assisted Alex in some undefined way based on an  
13 unidentified conversation that was intercepted at some unknown time between  
14 undisclosed people, the contents of which (or even a summary thereof) was never  
15 disclosed to the wiretap judge. Bates 154. There was no evidence that, after an entire  
16 month of wiretapping, Cabezon was ever intercepted over any of the target telephones  
17 speaking about anything, let alone speaking about any criminal activity. In fact, the  
18 affidavit made no further reference to Cabezon after stating that law enforcement wanted  
19 to listen in on Cabezon's conversations.

20       There was no better showing of probable cause that Cabezon was involved in any  
21 criminal activity, that he was likely to talk about such activity over the telephone, or that  
22 he ever communicated with anyone over the targeted telephones. 18 U.S.C. § 2518(3)(a),  
23 (b), (d).

24       **3. Larry Cuevas:** Officer Lavoie said no more than he stated in the February  
25 2009 affidavit: that Cuevas "was a *previous* customer and courier" of Alex's and that, no  
26 different than in February, Cuevas was still "in custody." Bates 152. Officer Lavoie did  
27 not suggest that, with the benefit of an entire month of wiretapping, there was any reason  
28 to believe that Cuevas was any more likely to be intercepted with any additional

wiretapping when he had not been intercepted during the first interception period. There was no better showing of probable cause that Cuevas was involved in any criminal activity, that he was likely to talk about such activity over the telephone, or that he ever communicated with anyone over the targeted telephones. 18 U.S.C. § 2518(3)(a), (b), (d).

**4. Gabriel Macias:** In support of his request to continue seeking to intercept Macias's conversation Officer Lavoie repeated the same information from August 2008 that was inadequate for a wiretap in February 2009.<sup>8</sup> Not only was that information insufficient to establish probable cause in February 2009 that Macias was engaged in ongoing criminal activity, was likely to use the target telephone, or communicated about criminal activity over any telephone, but all that information was now another month older and less informative as to Macias's current activities. In addition to being inadequate in the first place and now stale, after an entire month of additional wiretapping, law enforcement failed to encounter a single instance where Macias was intercepted speaking on any of the target telephones, let alone speaking about any criminal activity.

Having failed to establish probable cause that Macias was still engaged in criminal activity for which wiretapping would be authorized, 18 U.S.C. § 2516, 2518(3)(a), that Macias ever communicated over the target telephones, § 2518(3)(d), or was likely to talk about those alleged activities over any telephone, § 2518(3)(b), the government had no right to intercept Macias's conversations.

**5. Paul Onsurez and Shawn Young:** Officer Lavoie offered no new information to justify the continued wiretapping of Paul Onsurez or Shawn Young.<sup>9</sup> Just

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<sup>8</sup> Macias was believed to be under the influence of heroin when detained during a traffic stop, was in possession of heroin and cocaine, had some paper with nondescript "handwritten notes" on them, and, back in August 2008, spoke on the phone with someone (Hoyos) who Alex knew. Bates 209-10. See also Bates 082-83.

<sup>9</sup> The original application provided only the "belie[f]," unsupported by any specific facts, that Onsurez and Young were couriers for Alex, Bates 034-035, conclusions repeated in the March 2009 application, Bates 153-54, without any further elaboration.



1 like the previous application, Officer Lavoie never even mentioned Onsurez or Young in  
 2 the remainder of the affidavit after stating that they were among the individuals whose  
 3 conversations the government wanted to intercept.

4 In addition to the fact that no additional information was provided about Onsurez  
 5 or Young is the fact that, after an additional month of wiretapping, neither Onsurez nor  
 6 Young were ever caught by government agents engaging in any illegal activity, talking  
 7 on the target telephones, or talking on any phone about illegal activity.

8 Having failed to establish probable cause that Onsurez or Young were engaged in  
 9 criminal activity, that either ever used or communicated over the target telephones, or  
 10 was likely to talk about the hypothesized crimes over any telephone, the government had  
 11 no right to attempt to intercept their communications. 18 U.S.C. § 2518(3)(a), (b), (d).

12 **6. Richard “LNU”:** Officer Lavoie offered no new information to justify the  
 13 ongoing attempt to intercept telephone conversations with Richard LNU.<sup>10</sup> The  
 14 information that had been presented was now another month older and out of date and no  
 15 new information had been learned about him. There was no evidence that Richard had  
 16 been intercepted during an entire month of wiretapping activity, that his name had even  
 17 been mentioned during any intercepted phone call, or that he was any more likely to have  
 18 access to any of the targeted telephones in the future.

19 **7. Ray “LNU”:** Officer Lavoie offered no new information to justify the  
 20 continued attempt to intercept Ray’s telephone conversations.<sup>11</sup> There were still no facts  
 21 regarding Ray’s use of any telephones, let alone the target telephones, let alone that he  
 22 would communicate any information over the phone that was related to the investigation.

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24  
 25 <sup>10</sup> No different than in the February affidavit, he was identified as “a *former* customer” of  
 26 Alex’s,” and someone who knew someone who knew Alex. Bates 153. The only telephone  
 27 conversation that Richard had been involved in was when he called to report he had been robbed,  
 28 Bates 172, a singular instance that was now 2½ months in the past.

<sup>11</sup> As before, Ray was assumed to be a “customer” but the affidavit was devoid of any facts  
 from which the judge could reach that conclusion. Bates 153. He was also identified as “a  
 friend of Shawn Young,” with no further information that might explain why this fact would give  
 rise to probable cause to conclude he was engaged in illegal activity. Bates 153.

1 18 U.S.C. § 2518(3)(a), (b), (d).

2 **8. Mario “LNU”:** Officer Lavoie offered no new information to justify a  
3 continued effort to intercept conversations with “Mario.”<sup>12</sup> After an entire month of  
4 wiretapping, no conversation of Mario’s was intercepted. No mention was made of  
5 Mario. Law enforcement apparently knew no more about Mario in March 2009 than they  
6 had in February 2009 or, for that matter, in January 2009. There was a lack of probable  
7 cause that Mario was actually involved in the target offenses or was likely to  
8 communicate about them over the target telephones during the forthcoming interception  
9 period. 18 U.S.C. § 2518(3)(a), (b), (d).

10 **9. Patrick Orosco:** Other than affirming that Orosco continued to be in  
11 regular telephone contact with Alex, Bates 177, the March 2009 affidavit presented no  
12 new fact that tended to suggest any illegal activity by Orosco.<sup>13</sup> Given the ongoing  
13 contact between Orosco and Alex and the ongoing interceptions of Alex’s calls, the  
14 affiant’s failure to suggest that law enforcement ever intercepted Orosco speaking to Alex  
15 about any criminal activity during the entire month of prior wiretapping is striking  
16 evidence that no probable cause existed to intercept Orosco’s conversations. 18 U.S.C. §  
17 2518(a), (b).

18 **10. Sara Misquez:** Officer Lavoie suggested no new fact regarding Sara  
19 Misquez tending to confirm any ongoing criminal activity or communications over the  
20 target telephones. This is not surprising since, like Cuevas, she was identified as a target  
21 subject even though she was still “presently in custody.” Bates 151. Officer Lavoie did  
22 not suggest that there had been any change in her status or relationship to Alex as  
23 anything other than “a *previous* courier for Alex.” Bates 151. Officer Lavoie did not  
24 suggest that Misquez had been intercepted communicating over the target telephones at  
25

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26 <sup>12</sup> The only fact provided was that Mario was a customer of someone else who was connected  
27 to Alex, but no information that Mario ever had any contact or communication with Alex or  
28 anyone else over the targeted telephones. Bates 153, 173.

<sup>13</sup> Officer Lavoie hypothesized, as he did in February, that Orosco was “believed to be a  
narcotics courier for Alex[]” but still provided no facts to support that conclusion. Bates 152.

any time during the entire month of additional wiretapping nor identify any facts suggesting there was any basis for anticipating any communication by her over the target telephones at any time in the future. The affidavit failed to establish probable cause that Misquez was involved in the target offenses, was likely to speak about the target offenses, or was communicating over the target telephones. 18 U.S.C. § 2518(a), (b), (d).

**11. Juan Diaz:** Officer Lavoie's affidavit established only that Diaz spoke with Navarro about twice a day over Navarro's phone and that, like Navarro, Diaz was a member of the Black Angels. Bates 154, 182-83. Officer Lavoie "believe[d]" that Diaz's conversations related to "criminal activity of the Ontario Black Angeles" but offered no facts indicating that Diaz participated in any such alleged criminal activity, had any basis for knowing about the criminal activity, or any foundation from which one could reasonably infer that Diaz would be talking about these matters.

Diaz's alleged membership in the Black Angels was an insufficient demonstration of probable cause of any criminal activity. Merely being a member of an organization that law enforcement characterized as a "gang" is not a crime under California law, *People v. Gardeley*, 14 Cal.4th 605, 623, 59 Cal.Rptr.2d 356, 927 P.2d 713 (1996), or under federal law, *cf.* 18 U.S.C. § 1959, 1962 (criminalizing violent crimes in aid of racketeering and controlling an organization through a pattern of racketeering). Moreover, "the First Amendment protects an individual's right to join groups and associate with others." *Dawson v. Delaware*, 503 U.S. 159, 163, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992). Officer Lavoie did not submit any facts indicating that Diaz himself was participating in any criminal activity, was aware of any criminal activity, or spoke with Navarro about any criminal activity.

Devoid of any facts demonstrating that Diaz was engaged in criminal activity, § 2518(3)(a), and communicated about criminal activity over the phone, § 2518(3)(b), the affidavit was devoid of probable cause to expand the scope of the search to listen in on Diaz's conversations.

**12. Unidentified Male:** Law enforcement added an additional pseudonymous

individual, "UM" as a proposed target subject. Law enforcement's reasons for targeting "UM" is mysterious, unless the purpose was to add a generic descriptor enabling monitoring agents to listen in longer for every male's telephone calls on the target telephones. UM was hypothesized to be a person from whom Alex purchased narcotics of an unknown variety. More curiously, every fact Officer Lavoie mentioned about UM not only pre-dated the March 2009 wiretap application by 2 to 6 months, but pre-dated the February 2009 wiretap application. Bates 160-62, 198-205. If, after an entire month of wiretapping, the only facts law enforcement could muster regarding an initial attempt to intercept "UM" were facts known long before wiretapping started, and wiretapping had not contributed one iota to law enforcement's information base about UM, the justification for seeking to intercept UM's conversations was quite weak. 18 U.S.C. § 2518(b), (d).

**Summary:** The affidavit failed to establish all three required types of probable cause for at least 13 of the 19 individuals who monitoring agents would be listening for during their electronic interception, including defendant Juan Diaz.

#### **IV. The May 2009 Affidavit for Wiretap 09-38(B) Failed to Establish Probable Cause that Target Telephone #5 was Used By Navarro or Used for Conversations about Illegal Activity**

Agent Lavoie sought to target the communications on Target Telephone #5 on the ostensible ground that the phone was being used by Navarro to conduct illegal activity. Agent Lavoie provided no facts justifying his speculation on either point that could support a finding of probable cause.

Agent Lavoie acknowledged that Target Telephone #5 was not registered to David Navarro and was not registered to Navarro's address. The agent did not offer any information that the address to which the phone was registered was in any way associated with Navarro. Bates 291. Whatever speculation agent Lavoie might have offered about Target Telephone #5, he ignored that David Navarro had a history of using a phone

1 registered in his own name and registered to his home address. Bates 289-90.

2 The purported basis for probable cause that Navarro used Target Telephone #5  
 3 was pure speculation. Agent Lavoie said that a separate wiretap investigation suggested  
 4 that Alfredo Rodriguez, who was a suspected drug supplier, spoke on the phone with a  
 5 person named Jose LNU about Jose's desire to purchase cars, which agents speculated  
 6 might have been code for drug dealing. Separate and apart any communications with  
 7 Rodriguez, Agent Lavoie noted that Jose LNU used the same phone to talk to Rodrigues  
 8 that was also occasionally used to call Target Telephone #5. Bate 327. Agent Lavoie  
 9 had no basis for inferring that it was Jose calling Target Telephone #5, that the calls to  
 10 Target Telephone #5 related to any activity that was subject to electronic interception  
 11 under 18 U.S.C. § 2516, or that any such communication was with David Navarro.

12  
 13 **V. The Affidavit Supporting the May 2009 Wiretap 09-38(B) Failed to Establish**  
 14 **All Three Types of Probable Cause for Each Target**

15 1. The May 2009 wiretap identified the following individuals as target  
 16 subjects but included absolutely no facts about them to establish (a) probable cause that  
 17 they are committed or about to commit an offense subject to federal wiretapping, (b)  
 18 probable cause that communications regarding that offense would be intercepted by  
 19 wiretapping, or (c) probable cause that the phone being targeted was "leased to, listed in  
 20 the name of, or commonly used by such person." 18 U.S.C. § 2516(a), (b), (d):

- 21 • Richard Castorena
- 22 • Larry Cuevas
- 23 • Juan Diaz
- 24 • Mario LNU
- 25 • Gabriel Allen Macias
- 26 • Paul Onsurez
- 27 • Ray Perez

28 2. **Shawn Young:** The information about Shawn Young was no more

1 inculpatory than in previous applications, simply his friendship with Ray Perez (as to  
2 whom no probable cause was shown) and the amorphous unsubstantiated “belief” that, at  
3 some unspecified time, he “has acted as a . . . courier for Alex[.]” Bates 300-01.

4 **3. Carmela:** The only information about Carmela, beyond the fact that she  
5 was married to Alex, was that she may have had a bank account. Bates 337.

6 **4. Venegas, Martinez-Gonzalez, Hernandez, L. Diaz:** Agent Lavoie  
7 offered no information about Armando Venegas, Kevin Alejandro Martinez-Gonzalez,  
8 Steven Hernandez, or Lucio Diaz beyond listing them as target subjects.<sup>14</sup> The most  
9 recent information about each of these individuals was isolated incidents dating back to  
10 November 2008, six months before Wiretap 09-38(B) was being sought in May 2009.<sup>15</sup>  
11 Even though each had been the target of two state and two federal wiretaps since then, no  
12 information was alleged to exist that would suggest any of them had any further  
13 communication with Alex about hypothesized illegal activity or anyone else targeted on  
14 the investigation. Bates 169-70. There was a dearth of facts not only establishing  
15 probable cause of illegal activity but also communication about the target offenses over  
16 the target telephones. 18 U.S.C. § 2518(3)(a), (b), (d).

17 **5. Misquez:** The agent gave no information about Misquez more recent than  
18 August 2008, other than noting that Misquez was “presently in custody,” as she had been  
19 for the past 9 months. There remained no evidence that Misquez was participating in the  
20 target offenses or that she was communicating about them over the target telephones. 18  
21 U.S.C. § 2518(a), (b), (d).

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22  
23  
24 <sup>14</sup> The only information about these four was in *prior* affidavits. In the March 2009  
25 application, the most recent information about Diaz, Venegas and Hernandez were isolated  
26 telephone calls on November 14, 26 and 28, respectively. Bates 164, 169-70, 164-65. The most  
27 recent information about Martinez-Gonzalez was that he had been subjected to a traffic stop on  
28 November 20, 2008 after which he waived *Miranda* rights, said he wanted to answer questions  
and was eventually released without charges on the ground that there was insufficient evidence.  
Bates 166-67.

<sup>15</sup> Starting in the next wiretap application, the affiant would concede that Martinez-Gonzalez  
“has not been a source of supply for Alex since the beginning of the federal investigation in  
February 2009.” Bates 555, 741.

1           **6. Jose LNU:** Agent Lavoie did not identify any specific facts stating  
 2 purporting to indicate that Jose LNU was involved in illegal activity of any sort.  
 3 Although reporting that a Jose Silba and Alfredo Rodriguez were the targets of a separate  
 4 and entirely independent wiretap relating to a completely different investigation. Bates  
 5 347 ¶ 3.f, the affiant stated no facts from which the wiretap judge could independently  
 6 conclude this was the same Jose LNU let alone that this Jose was involved in illegal  
 7 activity. 18 U.S.C. § 2518(3)(a). The only purported corroboration was a single, isolated  
 8 telephone call between Rodriguez and Jose that took place 6 weeks before the new  
 9 wiretap application. Bates 327-28. There was no indication that any further contact  
 10 occurred before or in the 6 weeks after that conversation, leaving to pure speculation the  
 11 hypothesis that Jose would communicate over the target telephone in the upcoming one-  
 12 month wiretap period. 18 U.S.C. § 2518(b), (d).

13           **7. Cabezon:** Agent Lavoie reported that, a week before the May 1, 2009  
 14 wiretap application, 09-38(B), an informer told another officer that a person named  
 15 “Robert” “drives vehicles also used by Alex.” Bates 333-34. Agent Lavoie further  
 16 hypothesized, based on foundation never elucidated, “I believe that ‘Robert’ is Target  
 17 Subject Cabezon.” Bates 334. In addition to the fact that there is absolutely no factual  
 18 foundation for the assumption (and assertion) that Cabezon and Robert are one and the  
 19 same person, the wiretap judge was provided with absolutely no information from which  
 20 to reliably assess whether the informer was credible or reliable. *Aguilar v. Texas*, 378  
 21 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964). Indeed, Agent Lavoie’s only comments  
 22 about this informer was his observation that he “did not recognize any of the telephone  
 23 numbers” on the informer’s phone “as belonging to individuals that have communicated  
 24 with Alex,” that “this confidential has limited information” and that Agent Lavoie “was  
 25 unable to corroborate the information this confidential informant provided.” Bates 334.  
 26 There was no probable cause that Cabezon was involved in the target offenses. 18 U.S.C.  
 27 § 2518(3)(a).

28           **8. UM/SOS:** Although suspecting that a “UM” had previously worked with



Alex, Agent Lavoie advised the wiretap judge that “UM/SOS may have recently been arrested and deported to Mexico.” Bates 302. Agent Lavoie provided no basis for inferring that there was any continued communication between the two after “UM’s” arrest, let alone since his deportation. 18 U.S.C. § 2518(a), (b), (d).

**9. Jose Gutierrez & Gilberto Gutierrez:** Jose and Gilberto Gutierrez were subjected to a traffic stop on March 31, 2009, a month before the wiretap application 09-38(B) on May 1, 2009. After a consensual search revealed no contraband, both willingly spoke to police after waiving their *Miranda* rights. Gilberto was released based on finding insufficient evidence to arrest and Jose was taken into custody on an immigration hold. Bates 317. These facts fall far short of probable cause that they were involved in the target offenses. 18 U.S.C. § 2518(a).

**10. Steve Hoyos:** Hoyos was arrested on March 21, 2009, nearly 6 weeks before Agent Lavoie applied for the 09-38(B) wiretap on May 1, 2009. Bates 313-14, 334-36. Hoyos was still in custody when the May 1, 2009 wiretap was sought. Regardless of any previous misconduct, there was no showing of probable cause that Hoyos would be communicating over the target telephones to talk about the target offenses, especially while being held in custody. 18 U.S.C. § 2518(3)(b), (d).

**Summary:** Agent Lavoie provided no information suggesting that *any* of the foregoing individuals was “commonly used” – or was likely to use in the future – any of the target telephones. 18 U.S.C. § 2518(3)(b), (d). The affiant failed to establish all three elements of probable cause to intercept the electronic communications of defendants Juan Diaz and Santacruz Silva (a.k.a. Jose LNU) and, overall, 20 of the 25 target subjects.

## **VI. The Affidavit Supporting the May 2009 Wiretap 09-38(C) Failed to Establish All Three Types of Probable Cause for Each Target**

Four months after the first wiretap purporting to focus on the Black Angels, Agent Lavoie added several new individuals to the wiretap who were ostensibly associated with the group. Once again, however, there was no evidence that law enforcement had

1 developed *any* of the *three* required types of probable cause necessary to target them in  
2 the wiretap.

3       **1. Armando Barajas:** On May 10, 2009, Barajas was allegedly intercepted  
4 speaking to Navarro. Law enforcement noted only three subjects of conversation: (1)  
5 what they were doing for Mother's Day, (2) a "girl" of a "home boy" who was trying to  
6 get a lawyer, to which Barajas suggested contacting "all the little homies to see how  
7 much they could all pitch in . . . [so] they could get a lawyer," with the hope that, if they  
8 ran out of money, the lawyer might continue working on the case anyway or "maybe the  
9 court could help" and (3) that Barajas "was smoking" "a little," which Agent Lavoie  
10 speculated could have been talking about smoking marijuana. Bates 446-47. The first  
11 two subjects are not evidence of any crime and, even if the Agent correctly speculated  
12 that the third subject was discussion about smoking marijuana, that is not an "offense"  
13 that is a proper target offense for a wiretap. 18 U.S.C. §§ 2516, 2518(3)(a).

14       Moreover, the conversation came about when Reyes called Navarro and, during  
15 the conversation, Navarro happened to ask the person who called if Barajas was present  
16 with Reyes. Agent Lavoie offered no evidence that Reyes and Barajas were regularly  
17 together or that there was any basis for inferring that Barajas regularly spoke with  
18 Navarro. Indeed, after having wiretaps on Navarro's phone since February 2009, Agent  
19 Lavoie gave no indication that Barajas had ever before spoken on Navarro's phone before  
20 the June 2009 wiretap application, 18 U.S.C. § 2518(3)(d), or that there was any basis for  
21 concluding there was probable cause to believe he was likely to engage in any  
22 conversation in the future regarding criminal conduct that is subject to electronic  
23 interception, 18 U.S.C. § 2518(3)(b).

24       **2. Daniel Reyes:** Daniel Reyes made a single telephone call to Navarro.  
25 When Navarro said he was relaxing, according to Agent Lavoie's translation, Reyes said  
26 that "maybe Navarro could take some [marijuana] when Navarro went over" to some  
27 unidentified gathering. Bates 446. Even assuming Agent Lavoie was correct that Reyes  
28 was referring to marijuana, there was no suggestion that Reyes was discussing any crime

1 that was subject to electronic interception. 18 U.S.C. § 2516. Nor was there any  
 2 showing that Reyes had any regular communication with Navarro, let alone that there  
 3 was probable cause that he would be having conversations about any criminal conduct  
 4 over Navarro's phone in the future. 18 U.S.C. § 2518(3)(b), (d)

5       **3. Juan Gil:** Agent Lavoie identified Juan Gil as an individual "currently  
 6 incarcerated in an unknown federal institution." Bates 427 ¶ 22. Agent Lavoie  
 7 asserted his "belie[f]" that Navarro paid some of the extortion money he collected to  
 8 Gil's wife or to Gil himself. Bates 427, 436. Agent Lavoie provided no factual  
 9 foundation to support that belief nor did he provide any basis for imputing to Gil or his  
 10 wife the nature of the proceeds delivered to her by Navarro, let alone Gil's knowledge  
 11 thereof. No less importantly, Agent Lavoie provided the wiretap judge with absolutely  
 12 no facts suggesting that Juan Gil ever used any of the target telephones. Given the dearth  
 13 of facts sufficient to establish probable cause that Gil was involved in any offense,  
 14 combined with the complete absence of any indication that he ever used or had access to  
 15 the target telephones, no reasonable wiretap judge could have concluded that there was a  
 16 basis for intercepting Gil's communications. 18 U.S.C. § 2518(3)(a), (b), (d).

17       **4. "M":** Identified only as "an individual incarcerated in an unknown facility  
 18 that [sic] communicates with Navarro," the affiant suggested that a single conversation  
 19 on an unspecified date occurred where they "discussed a *possible* [homicide]." Bates  
 20 427. "In dealing with probable cause, however, as the very name implies, we deal with  
 21 probabilities." *Brinegar*, 338 U.S. at 175; accord *Illinois v. Wardlow*, 528 U.S. 119, 127,  
 22 120 S.Ct. 673, 145 L.Ed.2d 570 (2000). "The substance of all the definitions of probable  
 23 cause is a reasonable ground for belief of guilt." *Brinegar*, 338 U.S. at 175. It "mean[s]  
 24 *more* than bare suspicion." There was no "probable cause for belief that ["M"] was]  
 25 committing, has committed, or is about to commit a particular offense." 18 U.S.C. §  
 26 2518(3)(a). Having identified only the single telephone call by "M" – on an unspecified  
 27 date and therefore having no reference in time that it was reasonably contemporaneous to  
 28 the wiretap – there remained an absence of "probable cause for belief that particular

1 communications concerning that offense will be obtained,” 18 U.S.C. § 2518(3)(b), or the  
 2 existence of “probable cause for belief that the [telephone being targeted] . . . are leased  
 3 to, listed in the name of, or commonly used by such person,” 18 U.S.C. § 2518(3)(d).

4 **5.** Agent Lavoie made reference to no facts whatsoever in the body of the  
 5 affidavit purporting to establish any of the three required probable cause showing for any  
 6 of the following individuals:

- 7 • Richard Castorena
- 8 • Larry Cuevas
- 9 • Juan Diaz
- 10 • Lucio Diaz
- 11 • Victor Felix
- 12 • Steven Hernandez
- 13 • Mario LNU
- 14 • Gabriel Macias
- 15 • Kevin Alejandro Martinez-Gonzalez
- 16 • Paul Onsurez
- 17 • Jose LNU/Santacruz Silva
- 18 • Armando Venegas

19 **6. Teresa Castro (Osita):** After obtaining a wiretap on Teresa Castro in May  
 20 2009, 09-38(B), law enforcement did not suggest in their June 17, 2009 application that  
 21 they had developed any evidence from the earlier wiretap that Castro had any ongoing or  
 22 continued involvement or association with anyone under investigation nor that she was  
 23 ever capture on any of the target telephones. Indeed, Agent Lavoie conceded that, at that  
 24 time, Castro was now “a *former* street level dealer for Alex.” Bates 425.<sup>16</sup>

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25  
 26 <sup>16</sup> To the extent law enforcement believed that a wiretap was justified because money was  
 27 ostensibly being extorted from Castro, the suggestion would be an unfounded extension of the  
 28 wiretap laws to allow law enforcement to *target* a person’s private conversations on the  
 suspicion that they *might* be the victim of a crime. 18 U.S.C. § 2518(3)(a) only allows targeting  
 only the suspected criminal. If law enforcement genuinely believed Castro was being

1           **7. Salvador Martinez:** The affiant asserted his belief that Martinez “is a street  
 2 level narcotics dealer” but offered no specific fact to support a finding of probable cause  
 3 that Martinez was in fact engaging in narcotics trafficking. Indeed, the affiant even  
 4 admitted that, in the one phone call intercepted a month before the wiretap, Martinez was  
 5 saying “he had not been working all week and might not work” anymore. Bates 448.  
 6 This phone call occurred over a month before law enforcement applied for the June 2009  
 7 wiretap and there was no further evidence that, either before or during the following  
 8 month, Martinez was ever again involved in any illegal activity or that he communicated  
 9 over the targeted telephones. Law enforcement made no showing of probable cause that  
 10 “particular communications” concerning any offense Martinez may have been involved  
 11 in “will be obtained through such interception” or that any of the targeted telephones  
 12 were “commonly used by” him. 18 U.S.C. § 2518(3)(b), (d).

13           **8. Misquez and Hoyos:** Misquez and Hoyos were both still in custody at the  
 14 time of the June 17, 2009 wiretap application 09-38(C). There was no indication that  
 15 either remained in contact with any individual targeted by the investigation, let alone in  
 16 telephone contact. 18 U.S.C. § 2518(3)(b), (d).

17           **9. Ray Perez:** On May 26, 2009, three weeks before the June 17, 2009  
 18 wiretap application, 09-38(C), Alex was intercepted declaring unambiguously that “he  
 19 ‘did not want to work with Ray [Perez].’” Bates 440. Alex made unmistakably clear that  
 20 he did want not to associate “with the guys that just got out of jail because they were  
 21 being watched.” Bates 440. Alex categorically rejected having any future contact with  
 22 Ray. The affidavit did not suggest that there had been any contact or communication  
 23 between Perez and Alex (or Navarro or anyone else targeted by the investigation) during  
 24 the three weeks after that isolated phone call leading up to the time law enforcement  
 25 sought the June 17, 2009 wiretap, 09-38(C). Regardless of what the situation might have  
 26 been hypothesized to be months earlier, as of June 17, 2009, there was no factual

27  
 28  
 victimized, law enforcement could properly target the victimizer’s phone calls. 18 U.S.C. §  
 2518(3). While they might incidentally intercept her phone conversations with the victimizer,

1 foundation of probable cause that Perez was participating in the target offenses, that he  
 2 would be communicating about those hypothetical crimes with Alex (or anyone else), or  
 3 that there was probable cause that he would be communicating with Alex (or anyone  
 4 else) over either of the target telephones. 18 U.S.C. § 2518(3)(a), (b), (d).<sup>17</sup>

5 **10. Shawn Young:** No new information was provided about Shawn Young.  
 6 Bates 422.

7 **11. Carmela:** No new information was provided about Carmela. Bates 468.

8 **12. Cabezon:** Agent Lavoie asserted that law enforcement anticipated Cabezon  
 9 would be delivering drugs to Alex and Orosco but, after observing a meeting between the  
 10 three of them, stopped the latter and found no drugs in their possession. Bates 460.  
 11 Regardless of law enforcement's suspicion that the drugs may have been concealed,  
 12 Agent Lavoie identified no facts that the person Alex and Orosco had met with was  
 13 Cabezon or, more importantly, that Cabezon ever used any of the target telephones. 18  
 14 U.S.C. § 2518(3)(a), (b), (d).

15 **13. Jose Gutierrez & Gilberto Gutierrez:** Having previously acknowledged  
 16 that Jose Gutierrez was detained on an immigration hold and that both Jose and Gilberto  
 17 Gutierrez were released from criminal custody after waiving their *Miranda* rights and  
 18 voluntarily answering questions, the only new fact was that someone driving Gilberto's  
 19 car (but not necessarily Gilberto himself) parked in the driveway of Alex's house on May  
 20 19, 2009, a month before the new wiretap. Agent Lavoie did not suggest that either of  
 21 the Gutierrez's had been seen with any other suspect or intercepted talking on any of the  
 22 target telephones. There was no probable cause that either Gutierrez was involved in the  
 23 target offenses or communicating about them over the target telephones. 18 U.S.C. §  
 24 2518(a), (b), (d).

25  
 26 law enforcement could not properly *target* all her conversations for interception.

27 <sup>17</sup> In addition to the lack of relevant new information, law enforcement conceded that Misquez,  
 28 Hoyos, Hernandez, Cuevas, Castorena, and Castro were all "former" and "previous" contacts of  
 Alex and had no ongoing communication with any individual under investigation. Bates 420-21.  
 Their situation was the antithesis of probable cause that they might be in communication over the

1           **14. Red Eye:** Agent Lavoie identified a single telephone communication  
 2 between Alex and “Red Eye” that occurred three weeks before law enforcement applied  
 3 for the June 2009 wiretap. The affidavit nowhere suggests any facts upon which one  
 4 could conclude that Red Eye had ever communicated with Alex before May 26, 2009 or  
 5 that he had ever communicated after May 26, 2009 in the three weeks preceding the June  
 6 17, 2009 wiretap. There was a failure of “probable cause for believe that particular  
 7 communications concerning [any offense Red Eye might be involved in] will be obtained  
 8 through such interception” and a complete absence of “probable for belief that the  
 9 [telephone to be intercepted] . . . [were] leased to, listed in the name of, or commonly  
 10 used by [Red Eye].” 18 U.S.C. § 2518(3)(b), (d).

11           **15. Deborah Cortez and Roberto Sosa:** Nearly three weeks before law  
 12 enforcement applied for the June 2009 wiretap, 09-38(C), Cortez and Sosa were arrested.  
 13 Bates 453, 467. The affiant offered no evidence to support a finding of probable cause  
 14 that either had any communication with Alex or any other individual under investigation  
 15 after their arrest let alone had access to or communicated over the targeted telephone. 18  
 16 U.S.C. § 2518(b), (d).

17           **16. Victor Carrasco Felix:** Despite two months of wiretapping, the affiant  
 18 identified only a single episode, a telephone communication followed by a traffic stop,  
 19 after which Felix was released without charges, two months before the June 17, 2009  
 20 wiretap application. Regardless of whether the probable cause that Felix was committing  
 21 an offense was stale, especially in light of the absence of any intercepted communications  
 22 by Felix in the preceding two months, the affiant presented no facts to establish probable  
 23 cause that Felix was likely to communicate over the target telephone in the future. 18  
 24 U.S.C. § 2518(b), (d).

25           **Summary:** Law enforcement failed to establish probable cause for wiretapping  
 26 defendants Armando Barajas, Juan Gil, Juan Diaz, Daniel Reyes, Salvador Martinez, Jose  
 27 LNU (a.k.a. Santacruz Silva) and, overall, 30 of the 34 persons identified as target  
 28

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telephone with any of the target subjects.



1 subjects.

2  
3 **VII. The Affidavit Supporting the July 2009 Wiretap 09-38(D) Failed to Establish**  
4 **All Three Types of Probable Cause for Each Target**

5 Further Black Angels Investigation:

6 **1. Juan Diaz:** Over the past four months since March 2009, Agent Lavoie  
7 repeatedly stated nothing more than that Diaz was a member of the Black Angels but,  
8 despite five months of wiretapping on Navarro, had no further concrete factual  
9 information implicating Diaz in any criminal activity. The affiant stated that he “believed  
10 that Diaz was communicating with Navarro” but consistently admitted from March  
11 through July that “Diaz’s telephone number has not been identified” so his basis for that  
12 assumption relied entirely on speculation. The affiant further stated that he assumed that  
13 the communications (which he assumed took place) were “regarding the criminal activity  
14 of the Ontario Black Angels” but simultaneously admitted that only basis for that  
15 assumption was a “review of previous toll information” on a former phone of Navarro’s,  
16 demonstrating that not only was the information stale but he never had any information  
17 about the substance or topics discussed (assuming there even were communications  
18 between the two). Compare Bates 302 with Bates 558. The facts stated by the affiant  
19 failed to demonstrate probable cause (a) that Diaz was, had been, or would be involved in  
20 any criminal activity, or, despite five months of wiretapping, (b) that Diaz might  
21 communicate about any of the hypothesized crimes over the phone or (c) that Diaz  
22 “commonly used” any of the target telephones. 18 U.S.C. § 2518(3)(a), (b), (d).

23 **2. Juan Gil:** Despite a continuous 30 days of wiretapping, the only  
24 information known about Gil was that he was incarcerated at U.S.P. Hazleton, Bates 561-  
25 62, a fact that law enforcement was more likely to have determined through conferring  
26 with agents at B.O.P. than through the wiretap. The affiant failed to demonstrate  
27 probable cause that Gil was involved in any ongoing criminal activity in June 2009 and  
28 the same was true in July 2009. 18 U.S.C. § 2518(3)(a). Indeed, despite five months of

1 wiretapping and the last 30 days during which Gil was an identified target, the affiant did  
2 not suggest that law enforcement had ever overheard Gil communicating over the target  
3 telephones. The affiant equally failed to demonstrate probable cause that Gil “commonly  
4 used” the targeted telephone or was likely to communicate over them about the offenses  
5 that were the target of the investigation. 18 U.S.C. § 2518(3)(b), (d).

6 **3. Carlos Vasquez:** After four months of wiretapping Navarro, Agent Lavoie  
7 identified only a single telephone conversation between Navarro and Vasquez that  
8 occurred on June 24, 2009, three weeks before the July 17, 2009 wiretap application, 09-  
9 38(D). Bates 618. Elsewhere, the affiant asserted that Vasquez was “observed by  
10 surveillance to be present with Navarro” and that Vasquez was “regularly in contact with  
11 Navarro” but stated no facts indicating that Vasquez regularly contacted Navarro by  
12 telephone, let alone over target telephone, or regularly communicated with Navarro over  
13 the target telephone about the target offenses. Bates 563. The affidavit failed to  
14 demonstrate probable cause that intercepting Vasquez “commonly used” Navarro’s target  
15 telephone or that he “communicat[ed] concerning that [target] offense” over the target  
16 telephone. 18 U.S.C. § 2518(3)(b), (d).

17 **4. Fernando Morales:** The affiant stated Black Angels member Paul  
18 Rodriguez was murdered and that fellow member Fernando Morales “was *one of* the last  
19 subjects to be seen with Rodriguez prior to the homicide.” Bates 573. Although Agent  
20 Lavoie asserted that Morales was “suspected” of Rodriguez’s murder, the affiant stated  
21 no facts – other than the highly ambiguous and abstract assertion that Morales was “one  
22 of the last” people seen with Rodriguez – that would demonstrate “probable cause” that  
23 Morales had any role in the homicide. The affiant did not state how much time might  
24 have elapsed between their time together and Rodriguez’s death nor who else Rodriguez  
25 was seen with after he parted from Morales or why Morales was still a suspect. The  
26 affiant affirmed that Morales had not been charged with the homicide and, indeed, no  
27 homicide charges had been filed. Bates 563. The application did not demonstrate  
28 probable cause that Morales was guilty of any offense. 18 U.S.C. § 2518(3)(a).

1 Furthermore, Agent Lavoie disclosed that, as of the time of the wiretap  
 2 application, Morales was “in custody for leading police on a vehicle pursuit.” Bates 563,  
 3 573. The affiant identified no facts tending to suggest that, despite 4 months of  
 4 wiretapping activity, Morales had ever spoken to anyone over the target telephones in the  
 5 past or was likely to do so in the future, let alone to talk about the target offenses over  
 6 those telephones, especially now that he was in custody. 18 U.S.C. § 2518(3)(b), (d).

7 **5. Fernando Lopez:** The affiant stated only that he “believe[d]” that Lopez  
 8 “*possibly* sells narcotics, and assists in collecting extortion payments.” Bates 564. A  
 9 factually unsubstantiated “belief” does not establish probable cause. *Gates*, 462 U.S. at  
 10 239. The belief that there exists only an abstract “possibility” of criminal conduct, much  
 11 short of a demonstrable probability, falls far short of probable cause. *Brinegar*, 338 U.S.  
 12 at 175; *Wardlow*, 528 U.S. at 127. The showing failed to demonstrate probable cause of  
 13 criminal activity. 18 U.S.C. § 2518(3)(a). Although the affiant stated that his belief was  
 14 “based on intercepted conversations” over Navarro’s telephone, Bates 564, the affiant  
 15 failed to provide the wiretap judge with any factual basis for concluding that Lopez was  
 16 himself participating in the telephone calls (as opposed to simply being an individual  
 17 discussed by others), thereby failing to establish probable cause that Lopez would be  
 18 captured communicating over the targeted phone about the target offenses. 18 U.S.C. §  
 19 2518(3)(b), (d).

20 **6. Marlon Jiron:** The affiant represented that, after an interview on June 23,  
 21 2009, “Jiron and his girlfriend Jessica Perez . . . [were] considered to be cooperating  
 22 witnesses.” Bates 614. The affiant stated that Navarro spoke to two other individuals  
 23 over the target telephone about a search at Jiron’s home, Bates 574, 581, 605, but  
 24 provided no facts tending to suggest that Jiron himself ever communicated over the target  
 25 telephone, let alone communicated over that phone about the target offenses. 18 U.S.C. §  
 26 2518(3)(b), (d).

27 **7.** In addition to the foregoing, the affidavit also failed to provide *any* factual  
 28 basis for targeting the communications of “**Rude Boy**,” “**Boxer**,” “**El Oso**.” Both were

1 simply identified as target subjects and never again mentioned or alluded to in the body  
 2 of the affidavit. The affidavit did even so much as describe Rude Boy's, Boxer's or El  
 3 Oso's suspected roles in the offenses under investigation. Bates 543. Law enforcement  
 4 failed to demonstrate any type of probable cause as to either of these individuals. 18  
 5 U.S.C. § 2518(3)(a), (b), (d).

6 **8.** The affidavit advanced no new information about the following individuals,  
 7 as to whom there was no probable cause earlier and any information previously  
 8 developed was now stale:

- 9 • Teresa Castro
- 10 • Larry Cuevas
- 11 • L. Diaz
- 12 • Gilberto Gutierrez
- 13 • Jose Gutierrez
- 14 • Steven Hernandez
- 15 • Carmela LNU
- 16 • "M"
- 17 • Gabriel Macias
- 18 • Sara Misquez
- 19 • Paul Onsurez
- 20 • Patrick Orosco
- 21 • "Red Eye"
- 22 • Armando Venegas
- 23 • Shawn Young<sup>18</sup>

24 **9. Deborah Cortez & Roberto Sosa:** No further showing of probable cause  
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26 <sup>18</sup> In addition to the lack of relevant new information, law enforcement conceded that  
 27 Castorena, Castro, Cuevas, Felix, Hernandez, Hoyos, Misquez, Perez were all "former" and  
 28 "previous" contacts of Alex and had no ongoing communication with any individual under  
 investigation. Bates 555-. Their situation was the antithesis of probable cause that they might be  
 in communication over the telephone with any of the target subjects.

1 was made as to Cortez or Sosa. Quite the contrary, the affiant reported that, since they  
 2 were released from custody, “To our knowledge, [Cortez] has not been in contact with  
 3 Alex” and “To our knowledge, [Sosa] has not been in contact with Alex” either. Bates  
 4 560. There was a complete absence of probable cause to include Cortez or Sosa as  
 5 persons still involved in criminal activity, likely to communicate over the target  
 6 telephones, or likely to communicate about the target offenses. 18 U.S.C. § 2518(3)(a),  
 7 (b), (d).

8 **10. Kevin Alejandro Martinez-Gonzalez a.k.a. Chipó:** Agent Lavoie  
 9 dropped an even more explosive bombshell on his probable cause showing as to  
 10 Martinez-Gonzalez as well. Agent Lavoie admitted, for the first time after five months of  
 11 wiretapping, that Martinez-Gonzalez “has not been a source of supply for Alex since the  
 12 beginning of the federal investigation in February 2009.” Bates 555.

13 **11. Cabezon:** The affiant stated that “based on intercepted calls,” he  
 14 “believe[d] that Cabezon assists Alex.” Bates 557. The affiant did not clarify when the  
 15 calls had been intercepted, what specifically was said on the calls leading the affiant to  
 16 that “belief,” nor did he provide any facts as to the nature of Cabezon’s supposed  
 17 “assistance,” such as whether it involving knowing criminal activity or merely incidental  
 18 assistance (like fixing a flat tire or lending a cup of flour) that a person would not realize  
 19 directly assisted another’s criminal activity. 18 U.S.C. § 2518(3)(a). Equally significant,  
 20 although the conclusion was “based on intercepted calls,” the affiant did not provide the  
 21 wiretap judge with any specific facts indicating that Cabezon was actually a participant in  
 22 the intercepted calls as opposed to simply being talked about by others on the call.  
 23 Devoid of showing that Cabezon was likely to use the target telephone and discuss any  
 24 illegal activity, there was no probable cause to allow law enforcement to eavesdrop on  
 25 the phone until they could confirm that Cabezon was not one of the speakers. 18 U.S.C.  
 26 § 2518(3)(b), (d).

27 **12. Richard Castorena:** Not only was Castorena described as a “former”  
 28 contact of Alex’s, but the July 17, 2009 wiretap affidavit finally acknowledged that

1 Castorena had been arrested on March 20, 2009. Bates 570.<sup>19</sup> The affiant identified no  
 2 facts tending to suggest that, despite 4 months of wiretapping activity, Castorena ever  
 3 spoke to anyone over the target telephones in the past or was likely to do so in the future,  
 4 let alone to talk about the target offenses over those telephones, especially now that he  
 5 was in custody. 18 U.S.C. § 2518(3)(b), (d).

6 **13. Mario LNU:** The only information about Mario was that he “has been  
 7 intercepted” talking to Alex on the target telephones. Bates 556. The affiant provided no  
 8 information as to when the intercepted conversations took place so there was no basis for  
 9 inferring that Mario would continue to be in communication with Alex. 18 U.S.C. §  
 10 2518(3)(b), (d). Although asserting that Mario “is a customer of Alex’s,” the affiant  
 11 provided no specific facts to support that conclusion or the inference that he was  
 12 purchasing contraband as opposed to, for example, nursery supplies. 18 U.S.C. §  
 13 2518(3)(a).

14 **14. Octavio Pena:** The only fact relayed about Pena was that he was subjected  
 15 to a traffic stop during which “narcotics were *not* seized.” Bates 571. The affiant stated  
 16 no other specific facts implicating Pena in any criminal activity besides the hypothesis  
 17 that he was a “suspected source” of drugs to Alex. The suspicion, unsupported by  
 18 specific facts, failed to demonstrate probable cause of any criminal activity on Pena’s  
 19 part. *Gates*, 462 U.S. at 239. In addition, the affiant provided no facts that Pena had ever  
 20 communicated over the target telephone with any of the target subjects about any of the  
 21 target offenses. There was no probable cause for believing he would communicate over  
 22 the target phones about the target offenses in the future. 18 U.S.C. § 2518(3)(b), (d).

23 **15. Rebecca Estrada:** Although stating his belief that Estrada sold narcotics,  
 24 the affiant stated no specific facts to support that conclusion. While claiming that the  
 25 belief was “based on intercepted communications,” the affiant did not identify the time,  
 26 place, or substance of any of those communications that might have enabled the wiretap  
 27

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28 <sup>19</sup> This critical fact was not disclosed in either the May 1, 2009 or June 17, 2009 wiretap affidavits.

judge to make that independent determination. Bates 564. This failed to demonstrate probable cause of a criminal offense. *Gates*, 462 U.S. at 239; 18 U.S.C. § 2518(3)(a).<sup>20</sup> Moreover, the affiant stated no facts suggesting that Estrada ever communicated over the target telephones, let alone communicated over the target telephones about the target offenses. There was no showing of probable cause as to these two elements either. 18 U.S.C. § 2518(3)(b), (d).

**16. Ray Perez:** In addition to being identified as a “former customer” and “former narcotics distributor,” Bates 557, who the affiant reported Alex had adamantly refused to work with, Bates 440, Perez was now also in custody for other charges. Bates 571. Regardless of what may have been the case earlier, as of July 17, 2009, there was no factual foundation of probable cause that Perez was engaging in illegal activities, that he would be communicating about those hypothetical crimes with Alex (or anyone else), or that there was probable cause that he would be communicating with Alex (or anyone else) over either of the target telephones. 18 U.S.C. § 2518(3)(a), (b), (d).

**Summary:** The affidavit fails to establish all three required elements of probable cause for the wiretapping of defendants Juan Gil, Juan Diaz, Fernando Lopez, Marlon Jiron, Fernando Morales, Carlos Vasquez, Rebecca Estrada, and for 33 of the 46 target subjects overall.

## **VIII. The Affidavit Supporting the August 2009 Wiretap 09-38(E) Failed to Establish All Three Types of Probable Cause for Each Target**

**1. Juan Gil:** Beyond the information previously developed that failed to establish probable cause that Gil was involved in any of the target offenses, law enforcement conducted a mail cover at his wife’s home and developed no further leads as

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<sup>20</sup> The affiant noted that Estrada might also have been an extortion victim, but that being a victim is not a crime. Law enforcement has no authority to *target* the communications of a victim, only those of the victimizer. 18 U.S.C. § 2518(3)(a). While they might incidentally intercept her phone conversations with the victimizer, law enforcement could not properly *target* all her conversations for interception.



1 to Gil. Bates 806. Having failed to establish probable cause of a crime previously, law  
 2 enforcement still failed to establish probable cause of any ongoing criminal activity by  
 3 Gil, especially since the information previously provided was now stale. 18 U.S.C. §  
 4 2518(3)(a). Moreover, despite six full months of wiretapping including two months  
 5 where Gil was listed as a specifically identified target subject, law enforcement had still  
 6 failed to intercept a single instance of Gil communicating over the target telephones. The  
 7 affidavit therefore fails to establish probable cause that he “commonly used” the target  
 8 telephones or was likely to communicate anything regarding the target offenses over  
 9 them. 18 U.S.C. § 2518(3)(b), (d).

10 **2. Carlos Vasquez:** The affiant supplied the wiretap judge with no new facts  
 11 regarding Vasquez except that he had been arrested for the robbery of a liquor store on  
 12 August 1, 2009. Bates 796. Both prior to the robbery and in the intervening two weeks  
 13 thereafter, law enforcement did not intercept any communications by Vasquez over any  
 14 of the target telephones and provided the wiretap judge with no facts suggesting that,  
 15 after Vasquez’s arrest, this was in any way likely to change since he was now in custody.  
 16 The affidavit failed to establish probable cause that he would be communicating over the  
 17 target telephones and that he would do so regarding one of the target offenses. 18 U.S.C.  
 18 § 2518(3)(b), (d).

19 **3. Adolph Moraga:** Besides being a member of the Black Angels, which is  
 20 not itself a state or federal crime, *Gardeley*, 14 Cal.4th at 623, the affiant reported that  
 21 other unidentified people alleged that Moraga was “involved in the collection of extortion  
 22 payments.” Bates 751. The affiant did not disclose who provided this information, what  
 23 the people said, or when they allegedly said it. There was nothing, apart from the  
 24 affiant’s bare conclusion, that Moraga was involved in any criminal activity. *Gates* 462  
 25 U.S. at 293; 18 U.S.C. § 2518(3)(a). Although asserting that the conclusion was “based  
 26 on intercepted conversations” over the target telephones, the affiant gave the wiretap  
 27 judge no factual basis for concluding that Moraga himself was on any such phone calls,  
 28 that there was any basis for believing Moraga would be communicating over the target

1 telephones at any time in the future, or that he would be communicating over any  
2 telephone regarding the target offenses. 18 U.S.C. § 2518(3)(b), (d).

3 **4. Raul Prieto:** The only information relayed to the wiretap judge about Raul  
4 Prieto was that, a month before the current wiretap application, Carlos Rivera went into  
5 Prieto's home and hid a gun inside. Bates 752. Despite months of wiretapping, the  
6 affiant did not suggest that Prieto was ever intercepted communicating with any other  
7 target subject over any of the target telephones regarding any of the target offenses.  
8 There was no probable cause to identify Prieto as a target subject likely to communicate  
9 over the target telephones about the target offenses. 18 U.S.C. § 2518(3)(b), (d).

10 **5. Michael Sanchez:** The only criminal activity imputed to Sanchez was  
11 participation in the liquor store robbery along with Vasquez on July 29, 2009. Bates 751,  
12 760. The affiant provided no facts to suggest that Sanchez had been intercepted on any  
13 target telephone either before or after the liquor store robbery nor that there was probable  
14 cause to believe that he would be communicating about that activity over the target  
15 telephone (or any telephone), especially now that he was being detained in custody. 18  
16 U.S.C. § 2518(3)(b), (d).

17 **6.** As was the case with the July 17, 2009 wiretap, 09-38(D), law enforcement  
18 sought to intercept the conversations of "**Rude Boy**," "**Boxer**," "**El Oso**" without  
19 providing *any* factual basis for targeting their communications. Once again, these  
20 individuals were simply identified as target subjects and never again mentioned or  
21 alluded to in the body of the affidavit. The affidavit did even so much as describe their  
22 suspected roles in the offenses under investigation. Bates 727. Law enforcement failed  
23 to demonstrate any type of probable cause as to either of these individuals. 18 U.S.C. §  
24 2518(3)(a), (b), (d).

25 **7.** The affidavit advanced no new information about the following individuals,  
26 as to whom there was no probable cause earlier and any information previously  
27 developed was now stale:

- 28 • Cabezón

- Richard Castorena
- Teresa Castro
- Deborah Cortez
- Larry Cuevas
- J. Diaz
- L. Diaz
- Victor Felix
- Gilberto Gutierrez
- Jose Gutierrez
- Steven Hernandez
- Marlon Jiron
- Carmela LNU
- Mario LNU
- Fernando Lopez
- “M”
- Gabriel Allen Macias
- Kevin Martinez-Gonzalez (Chipo)<sup>21</sup>
- Sara Misquez
- Fernando Morales
- Paul Onsurez
- Patrick Orosco
- Octavio Pena
- Red Eye
- Roberto Sosa
- Armando Venegas
- Shawn Young

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<sup>21</sup>. As to Martinez-Gonzalez, the affiant once again reaffirmed that “to my knowledge, [Martinez-Gonzalez] has not been a source of supply for Alex since the beginning of the federal

1           **8. Ray Perez:** The affiant offered no significant new information about Ray  
 2 Perez. The affiant reported that Navarro received a telephone call from “Kim” who said  
 3 she was a friend of “Nancy, over on Nevada,” who, in turn, “was good friends with the  
 4 Perez” when Kim lived there. Bates 761. The affiant did not attempt to clarify whether  
 5 Kim was referring to Ray Perez or Jessica Perez (Jiron’s girlfriend). Regardless,  
 6 however, Ray Perez was still described only as “a former customer” and “a former  
 7 narcotics distributor” and this isolated reference does not create probable cause that Perez  
 8 was engaging in any target offenses where none existed before. 18 U.S.C. § 2518(3)(a).  
 9 Moreover, despite months and months of wiretapping, law enforcement had still utterly  
 10 failed to provide any basis for inferring that Perez ever communicated over the target  
 11 telephones let alone that he communicated over them regarding the target offenses. 18  
 12 U.S.C. § 2518(3)(b), (d).

13           **9. Rebecca Estrada:** The only telephone communications the affiant said  
 14 Estrada participated in were conversations where she was being victimized by other  
 15 people. Regardless of what she did for a living, law enforcement did not target her  
 16 communications because they were trying to develop evidence that she was involved in  
 17 illicit activities. The affiant asserted that Estrada’s only relevant phone communications  
 18 were of her being victimized by someone else. This does not establish probable cause of  
 19 criminal activity on her part. 18 U.S.C. § 2518(a). Although law enforcement may have  
 20 been free to target the phone conversations of her victimizer and capture her  
 21 conversations incidentally, there was a clear lack of probable cause that Estrada was  
 22 commonly using the target telephones or discussing criminal activity therein. Law  
 23 enforcement should not have been allowed to target her conversations. 18 U.S.C. §  
 24 2518(3)(b), (d).

25           **Summary:** The affidavit failed to establish all three types of probable cause to  
 26 justify wiretapping of defendants Juan Diaz, Juan Gil, Marlon Jiron, Adolph Moraga,  
 27 Fernando Morales, Raul Prieto, Michael Sanchez, Carlos Vasquez, and, overall, 37 of 53  
 28

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investigation in February 2009,” six months earlier. Bates 740.

1 target subjects.

## 3 **IX. The Shortcomings of Probable Cause were Prejudicial**

4 “Even when only a portion of a search warrant is invalid, the subject of the search  
5 suffers a constitutional violation.” *Bravo v. City of Santa Maria*, 665 F.3d 1076, 1083  
6 (9th Cir. 2011) (internal quotations omitted). “[A] search or seizure of a person must be  
7 supported by probable cause particularized with respect to that person. This requirement  
8 cannot be undercut or avoided by simply pointing to the fact that coincidentally there  
9 exists probable cause to search or seize another.” *Ybarra v. Illinois*, 444 U.S. 85, 91 100  
10 S.Ct. 338, 62 L.Ed.2d 238 (1979)

11 The mere fact that a person is listed as a Target Subject enables agents to  
12 rationalize listening to each intercepted conversation for a longer period of time than if  
13 there were no probable cause for that person. *United States v. Rivera*, 527 F.3d 891, 907  
14 (9th Cir. 2008); *United States v. Torres*, 908 F.2d 1417, 1424 (9th Cir. 1990).

15 Evidence from the foregoing wiretaps, and evidence derived therefrom, should be  
16 suppressed.

## 18 **X. The Wiretaps Failed to Present a Full and Complete Statement of Probable 19 Cause**

20 Wiretaps are different from other types of warrants. A regular warrant can be  
21 issued on a bare showing of probable cause. With wiretaps, however, Congress  
22 “intended to ‘make doubly sure that the statutory authority [for wiretaps] be used with  
23 restraint and only where the circumstances warrant the surreptitious interception of wire  
24 and oral communications.’” *United States v. Gonzalez, Inc.*, 412 F.3d 1102, 1110 (9th  
25 Cir. 2006), quoting *United States v. Giordano*, 416 U.S. 505, 515, 94 S.Ct. 1820, 40  
26 L.Ed.2d 341 (1974).

27 Rather than permit issuance merely on a showing of probable cause, Congress  
28 required that law enforcement inform the issuing court of “a full and complete statement

1 of the facts and circumstances relied upon by the applicant, to justify his belief that an  
 2 order should be issued, including [] details as to the particular offense that has been, is  
 3 being, or is about to be committed,” 18 U.S.C. § 2518(1)(b).

4 As to each of the wiretaps, the affiant averred “I have not set forth every fact  
 5 known to this investigation” and the affidavit “does not contain all of the facts known to  
 6 this investigation.” Bates 29 ¶ 14; Bates 30 ¶ 17.<sup>22</sup> Such a confession and disclaimer is  
 7 the antithesis of a “full and complete statement.”

8 Indeed, the failure to state facts pertinent to probable cause for most of the target  
 9 subjects is further corroboration that Officer Lavoie utterly failed to provide a “full and  
 10 complete statement” of probable cause for the wiretaps.

#### 11 CONCLUSION

12 For all the foregoing reasons, the motion should be granted.

13  
 14 Respectfully submitted,

15 KESTENBAUM EISNER & GORIN LLP

16  
 17 Dated: September 17, 2012

/S/ ALAN EISNER

18 ALAN EISNER  
 19 Attorney for Defendant  
 20 JUAN GIL  
 21  
 22  
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27 <sup>22</sup> Officer Lavoie made the same admissions in each extension of the original wiretap. 09-  
 28 38(A) Bate 148-49 ¶¶ 15, 18; 09-38(B) Bates 295, 297 ¶¶ 17, 20; 09-38(C) Bates 417-18 ¶¶ 18,  
 21; 09-38(D) Bates 552-53 ¶¶ 22, 25; 09-38(E) Bates 737-38 ¶¶ 25, 28; 09-38(F) Bates 903-05  
 ¶¶ 27, 30.